Due service of the within petition and motion is hereby acknowledged this.....day of April, A. D. 1933.

Attorneys for David Burnet, Commissioner.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1932
No. 541.

David Burnet, Commissioner of Internal Revenue,
Petitioner,
vs.
A. T. Jergins Trust,
Respondent.

Brief of Nowland M. Reid, City Attorney of the City of Long Beach, California, and Geo. W. Trammell, Jr., Assistant City Attorney, as Amici Curiae.

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I.

The Opinion of This Honorable Court Unjustly Discriminates Against the Sovereignty of the State of California and Is a Departure From the Fundamental Law of the Land.

In its opinion, this Honorable Court attempts to distinguish the instant case from its opinions in the cases of *Gillespie v. State of Oklahoma,* 257 U. S. 501, and *Burnet v. Coronado Oil & Gas Company,* 285 U. S. 393, 76 L. Ed. 815, on the ground that in the latter two cases "the sovereign was acting as a trustee of an express trust with regard to the lands leased". The principles of immunity herein contended for have never been confined to the per-

formance of a special or express governmental trust. The foundation for the immunity doctrine is the opinion of Chief Justice Marshall in the case of *McCulloch v. The State of Maryland,* 4 Wheat. 316. The bank in that case was held to be an instrumentality of the Federal Government and as such was immune from taxation. There was no provision in the Constitution which gave the Federal Government the "express" right to own or operate a bank, or to use a bank as a federal depositary; such a right, Chief Justice Marshall stated, was implied from the very nature of the Government. It is a universal doctrine in the construction of all instruments that what is implied is as much a part of the instrument as what is expressed. Had the immunity doctrine at that time been limited to the fulfillment of "express trusts" of a governmental nature, the famous decision would have been reversed.

Chief Justice Marshall recognized that all the powers of a government could not be specifically enumerated in a constitution. His decision in the foregoing case rests upon the fundamental principle that our dual system of government could not exist unless the instrumentalities of the State and Federal sovereigns should be free from interference by one another. He stated, at page 421:

> "* * * Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The attorneys representing the State of Maryland most vigorously argued that the principle of immunity should not be extended to a federal instrumentality and especially

if that instrumentality was not one created under express provisions of the Constitution. In speaking of the immunity doctrine, Chief Justice Marshall stated, at page 430:

> "* * * We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is, an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give."

The foregoing principles during the last one hundred years have been iterated and reiterated and the members of the Bar have considered those principles as much a part of the Constitution as the express provisions therein. The denial of the application of those principles to the case at bar, it seems, is a direct departure from these very fundamental principles. At the time the treaties were made with the Indians who were sent to Oklahoma, their lands were not thought to be underlain with oil. It, therefore, may be safely stated that there was no "express trust" imposed upon the Federal Government to lease the lands for oil. The Federal Government merely had a treaty obligation to fulfill and in this sense it was a trustee.

However, this Honorable Court in the *Gillespie* case did not base its opinion upon an "express trust". In this case this Honorable Court stated, at page 505:

> "* * * That such leases were not taxable, went on *general principles,* * * *. The criterion of interference by the states with interstate commerce is one of degree. * * * The rule as to instrumentalities of the United States, on the other hand, is *absolute in form and at least stricter in substance.* * * * 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' * * * The step from this to the invalidity of the tax upon income from the leases is not long. * * *" (Italics ours.)

And, at page 506, the Honorable Court stated:

> "* * * The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases; * * *."

The "general principles" referred to in the foregoing case where the principles laid down by Justice Marshall, and their application was most certainly not confined to an "express governmental trust". A failure to apply these principles to the case at bar is a discrimination against the state of California and a departure from the fundamental law of the land.

The school lands at the time acquired by the state of Oklahoma were thought not to contain mineral; indeed, there was a conscious effort on the part of the Federal Government to retain all mineral lands. Consequently, there was no "express" provision imposing a duty upon the state of Oklahoma to lease its lands for oil. The state of Oklahoma, like the City of Long Beach, had merely

the duty of utilizing its lands. The immunity allowed by this Honorable Court in the case of *Burnet v. Coronado Oil & Gas Company,* 285 U. S. 393, 76 L. Ed. 815, so far as that opinion is concerned, was not based upon a specific trust other than a general governmental duty. In that case this Honorable Court again reviewed the many decisions theretofore announced by it and approved its long established principles of exempting from taxation by the states of the instrumentalities of the United States, and the means and operations whereby it exerted governmental powers.

The immunity doctrine applied to holders of public securities is not based upon a trust any more specifically expressed than the trust imposed by the state of California upon the City of Long Beach. It is true that under the Federal Constitution, the Federal Government is given the power to raise revenues and to borrow money. However, there is no express provision permitting or authorizing the Federal Government to issue bonds; that means of raising money is necessarily implied. This Honorable Court, in the case of *The Macallen Company v. Commonwealth,* 279 U. S. 620, in referring to these principles, states, at page 631:

> "A liberal application of the foregoing principles, which find confirmation especially in the later decisions of this court, *is essential to the preservation of the constitutional limitations* imposed upon the taxing power of the states. Let it once be conceded that such limitations may be evaded by the adoption of a delusive name to characterize the tax or form of words to describe it, and the destruction of the vitality of these necessary safeguards will soon follow." (Italics ours.)

The necessity for the perpetuation of the foregoing principles is certainly impregnated in the hearts and souls of all of the members of the Bar. These principles, by virtue of the oft-repeated decisions of this court, have become part of the Constitution itself. If these principles are vital to the Constitution, then it is believed that they should be liberally applied, in order that their *vitality* may be maintained. These principles, by limiting their application, may be as effectively killed as a complete repudiation thereof. If these principles are to be applied only in the cases of "express trusts", then the reasons for the principles cease to exist. This naturally follows because of the impossibility of creating "express trusts" for the performance of every public duty.

The City of Long Beach was not built for the sole object of being incorporated, but was incorporated as affording the best means of being well governed. It obtained all of its powers from specific constitutional and statutory provisions of the sovereign state of California. Among the powers granted by the state to the city was the power to acquire, own and use land for the "common good". [R. 98.] The trust imposed upon the City of Long Beach was expressed in writing and, therefore, it is most sincerely urged, constitutes more of an "express trust" than can be found in either the case of *Burnet v. Coronado Oil & Gas Company*, 285 U. S. 393, 76 L. Ed. 815, or *Gillespie v. State of Oklahoma*, 257 U. S. 501. The pronouncement by Chief Justice Marshall of immunity principles was not confined to a single purpose. If we may rely upon the importance that has been attached to the preservation of these principles, no one would be able to forecast the baneful effect that a narrow construction

may have upon the operations of the State and Federal Governments.

The City of Long Beach, having received delegated authority to own and use land, had an *express public* function to perform. Human language could not more clearly confer an "express trust" than the written delegation of power conferred by the state upon the City of Long Beach. Certainly Long Beach is as much entitled to the complete use of its property as is the state of Oklahoma. Oklahoma merely utilized lands which it had acquired by grant from the Federal Government. Long Beach was only utilizing lands which it had acquired under specific authority (express trust) from the state of California. The lands of the City of Long Beach could be used only for governmental purposes—for the common good. A doctrine inferring that governmental lands may be used by the government for other than governmental purposes is a strange and dangerous doctrine in our democracy. Governmental lands have always been considered to be held in sacred trust—their use is as much a part of that sacred trust as their ownership.

To deny the City of Long Beach the same considerations that were extended to the state of Oklahoma is discriminatory and works a grave injustice upon the city, as well as upon the sovereign state of California. In principle, it is respectfully submitted, there is no difference between the case at bar and the Coronado and Gillespie cases. If anything, the utilization of the lands of the City of Long Beach through its instrumentality (which was created for a specific purpose) is closer to the exercise of governmental functions than is the utilization of school lands by the state of Oklahoma.

It is respectfully urged that these fundamental constitutional principles, if they are to be perpetuated, should have uniform application, and that the City of Long Beach should not be discriminated against in the exertion of its governmental powers. Long Beach is just as much entitled to exert its constitutional and charter powers without interference by the Federal Tax Bureau as the state of Oklahoma. The conservation and orderly development of our institutions necessarily rest upon our acceptance of the results of the past and their use as lights to guide our steps in the future. If confusion and turmoil are to be avoided, then settled constitutional principles should not be directly or indirectly overthrown. The security of this great nation by the perpetuation of the Constitution can only be secured by the stability of teachings and the sanctity which surrounds the foregoing principles. To disturb the permanency of these principles would be to weaken the security of the Federal Government. If the application of these principles is to be so restricted as to permit the interference (so valiantly fought by Chief Justice Marshall) by the Federal taxing authorities of the means and instrumentalities of the state governments created and used for the fulfillment of public trusts, then the reserved rights of states and their instrumentalities, as provided for in the Tenth Amendment to the Constitution, are of little worth. Legal precedents may sometimes be overruled, but the constitutional principles herein referred to, hedged about as they are by precedents over a century old, should not be devitalized by restrictions against their reasonable application.

In view of the great importance of the questions herein presented and in view of the discriminatory effect of the

decision against the sovereign state of California, it is respectfully prayed that this petition for rehearing be granted and that an opportunity be given for further argument.

Respectfully submitted,

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